



**United States Department of Justice**

*United States Attorney  
Northern District of New York*

---

445 Broadway, Room 218  
James T. Foley U.S. Courthouse  
Albany, New York 12207-2924

Tel.: (518) 431-0247  
Fax: (518) 431-0249

December 23, 2022

Hon. Mae A. D'Agostino  
United States District Court Judge  
Northern District of New York  
James T. Foley Federal Courthouse  
445 Broadway  
Albany, New York 12207

Re: Sentencing Hearing in *United States v. Xiaoqing Zheng*  
19-CR-156 (MAD)

Dear Judge D'Agostino,

The government respectfully submits this brief letter in response to the defendant's Supplemental Authority in Support of Defendant's Sentencing Memorandum filed on December 14, 2022. Dkt. No. 320. In the defendant's filing, he cites to the Third Circuit's recent decision in *United States v. Banks*, 2022 WL 17333797 (3d Cir. 2022) which, in a case of apparent first impression, held that U.S.S.G. § 2B1.1 does not include intended loss, and only applies to actual loss. *Id.* at \*6-\*7.

The government Shepardized the *Banks* case just prior to filing this letter and found no other circuit court decisions that cite, let alone follow, *Banks*. Moreover, the government could not identify a single case (district court or appellate court) within the Second Circuit that cites to *Banks* and its holding on loss.

In the Second Circuit, loss is not limited to actual loss. Rather, a district court's loss determination under U.S.S.G. § 2B1.1(b)(1) is to be the greater of "actual loss or intended loss .. ." *United States v. Skys*, 637 F.3d 146, 153 (2d Cir. 2011); *see also, United States v. Lacey*, 699 F.3d 710, 718 (2d Cir. 2012).

Finally, even if the Court was to follow *Banks'* holding, the actual loss to GE, at a minimum, exceeds \$1.5 million for the reasons cited in the government's second sentencing memorandum. *See* Dkt. No. 311.

Thank you.

Letter to Judge D'Agostino  
*United States v. Zheng*  
19-CR-156 (MAD)  
December 23, 2022  
Page 2

Very truly yours,

CARLA B. FREEDMAN  
United States Attorney

By: /s/ Richard Belliss  
Richard D. Belliss  
Assistant U.S. Attorney

Copy to:

Kevin Luibrand, Esq. (via ecf)  
Luibrand Law Firm, PLLC  
950 New Loudon Road, Suite 270  
Latham, New York 12110

*Attorney for Xiaoqing Zheng*